

JOSEPH P. RUSSONIELLO, CSBN 44332

United States Attorney

JOANN M. SWANSON, CSBN 88143

Chief, Civil Division

EDWARD A. OLSEN, CSBN 214150

Assistant United States Attorney

450 Golden Gate Avenue, Box 36055

San Francisco, California 94102

Telephone: (415) 436-6915

FAX: (415) 436-6927

Attorneys for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SURABI MENON,

Plaintiff,

v.

MICHAEL CHERTOFF, Secretary of the
Department of Homeland Security (DHS);

EMILIO T. GONZALEZ, Director of the
U.S. Citizenship and Immigration Service,
(USCIS);

DONALD NEUFELD, Director of California
Service Center of USCIS;

ROBERT S. MUELLER, III, Director of
Federal Bureau of Investigation (FBI),

Defendants.

No. C 08-0207 JSW

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO DISMISS**

Date: June 6, 2008

Time: 9:00 a.m.

PLEASE TAKE NOTICE that on June 6, 2008, at 9:00 a.m., or as soon thereafter as the parties may be heard, the defendants will bring for hearing a motion to dismiss this action for lack of subject matter jurisdiction and for failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The hearing will take place before the Honorable Jeffrey S. White, in Courtroom 2, 450 Golden Gate Avenue, 17th Floor, San Francisco, CA 94102.

This Motion is based on the discussion contained in the motion, pleadings, papers and files in this action, the declaration of Janaki Rangaswamy and such oral argument as may be presented at

MOTION TO DISMISS
C08-0207 JSW

1 the hearing on the motion.

2
3 Dated: March 14, 2008

Respectfully submitted,

4 JOSEPH P. RUSSONIELLO
5 United States Attorney

6
7 /s/
8 EDWARD A. OLSEN
9 Assistant United States Attorney
10 Attorneys for Defendants
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MOTION TO DISMISS
C08-0207 JSW

I. INTRODUCTION

The plaintiff, Surabi Menon, is a lawful permanent resident of the United States who filed an application for naturalization with the United States Citizenship and Immigration Services (“USCIS”) on June 20, 2006. The USCIS has not yet adjudicated her naturalization application because the FBI has not yet completed a mandatory name check of the plaintiff. On January 11, 2008, the plaintiff filed this action seeking an order directing USCIS to adjudicate her naturalization application. The defendants ask this Court to dismiss the plaintiff’s action for lack of subject matter jurisdiction and/or for failure to state a claim upon which relief can be granted.

II. FACTUAL BACKGROUND

Plaintiff is a lawful permanent resident of the United States. Complaint ¶ 2. On June 20, 2006, she filed an application for naturalization with USCIS. Declaration of Janaki Rangaswamy ¶ 17. As part of its processing of the plaintiff’s naturalization application, the USCIS asked the FBI to conduct a mandatory name check of the plaintiff on June 20, 2006. *Id.* To date, the FBI has not yet completed the plaintiff’s name check. Declaration of Michael Cannon ¶ 41. In light of the fact that the FBI has not yet completed the plaintiff’s name check, USCIS has not scheduled an interview of the plaintiff on her naturalization application. Rangaswamy Declaration ¶ 18; 8 C.F.R. § 335.2(b) (“The Service will notify applicants for naturalization to appear before a Service officer only after the Service has received a definitive response from the Federal Bureau of Investigation that a full criminal background check of an applicant has been completed.”) (emphasis added).

The plaintiff filed this action on January 11, 2008, asking this Court to direct USCIS to adjudicate her naturalization application within a reasonable period of time. Complaint ¶ 30.

III. LEGAL BACKGROUND

A. LEGAL STANDARD APPLICABLE TO THIS MOTION

When a defendant moves to dismiss a complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of proving that the court has jurisdiction to decide the claim. See *Thornhill Publ’n Co. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). A motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) may

1 be granted when the plaintiff fails to set forth a “cognizable legal theory” or fails to provide
 2 “sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dep’t, 901
 3 F.2d 696, 699 (9th Cir. 1990).

4 B. NATURALIZATION

5 With the enactment of the Immigration Act of 1990, the federal courts were stripped of their
 6 exclusive jurisdiction to entertain applications for naturalization. Immigration Act of 1990, Pub.
 7 L. No. 101-649, § 4011, 1204 Stat. 4978 (November 29, 1990). Now, the Secretary of the
 8 Department of Homeland Security has “sole authority to naturalize persons as citizens of the
 9 United States.” 8 U.S.C. § 1421(a). “Before a person may be naturalized, and employee of the
 10 Service, or of the United States designated by the Attorney General,¹ shall conduct a personal
 11 investigation of the person applying for naturalization” 8 U.S.C. § 1446(a); see also 8
 12 C.F.R. § 335.1 (“Subsequent to the filing of an application for naturalization, the Service shall
 13 conduct an investigation of the applicant. The investigation shall consist, at a minimum, of a
 14 review of all pertinent records.”).

15 Before a decision is rendered on an alien’s application to naturalize, USCIS, in conjunction
 16 with the FBI, conducts several forms of security and background checks to ensure that the alien is
 17 eligible for the benefit sought and that she is not a risk to national security or public safety. See
 18 Rangaswamy Declaration ¶ 3. These checks currently include: (1) an FBI name check, which is
 19 run against FBI investigative databases compiled by law enforcement agencies including
 20 administrative, applicant, criminal, personnel and other files; (2) an FBI fingerprint check, which
 21 provides information relating to criminal background within the United States; and (3) a check
 22 against the Interagency Border Inspection System (“IBIS”), which contains records and
 23 information from more than 20 federal law enforcement and intelligence agencies, and is used to
 24 compile information regarding national security risks, public safety concerns, and other law

25
 26 ¹On March 1, 2003, the Department of Homeland Security and its United States
 27 Citizenship and Immigration Services assumed responsibility for adjudication of naturalization
 28 applications. 6 U.S.C. § 271(b). Accordingly, the discretion formerly vested in the Attorney
 General is now vested in the Secretary of Homeland Security. 6 U.S.C. § 551(d).

1 enforcement concerns. See Rangaswamy Declaration ¶ 3.

2 Congress has mandated that the agency withhold adjudication until the necessary background
3 checks are complete:

4 [D]uring fiscal year 1998 and each fiscal year thereafter, none of the funds
5 appropriated or otherwise made available to the Immigration and
6 Naturalization Service shall be used to complete adjudication of an application
7 for naturalization unless the Immigration and Naturalization Service has
8 received confirmation from the Federal Bureau of Investigation that a full
9 criminal background check has been completed

10 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations
11 Act of 1998 (“Appropriations Act of 1998”), Pub. L. 105-119, 111 Stat. 2440, 2448-49;
12 Rangaswamy Declaration at ¶ 4.

13 If USCIS has failed to make a determination on an application for naturalization within 120
14 days of the applicant’s examination, the applicant may ask the District Court for a hearing on his
15 or her naturalization application under 8 U.S.C. § 1447(b). Here, the plaintiff has not yet been
16 examined on her naturalization application. Accordingly, 8 U.S.C. § 1447(b) has no application to
17 this case.

18 C. THE FBI NAME CHECK

19 The FBI’s National Name Check Program’s mission is to disseminate information from the
20 FBI’s Central Records System (CRS) in response to requests from federal agencies such as USCIS.
21 Declaration of Michael Cannon ¶ 4. The CRS contains the FBI’s administrative, personnel and
22 investigative files. *Id.* ¶ 5. When the FBI searches a person’s name, the name is electronically
23 checked against the FBI’s Universal Index. Cannon Declaration ¶ 11. The searches seek all
24 instances of the individual’s name, social security number, and dates close to his or her date of
25 birth, whether a main file or reference file. *Id.* The names are searched in a multitude of
26 combinations, switching the order of first, last and middle names, and so on. *Id.* If there is a
27 match with a name in a FBI record, it is designated as a “Hit,” meaning that the system has stopped
28 on a possible match with the name being checked. Cannon Declaration ¶ 12. If a search comes up
with a match to a name and either a birth date or security number, it is designated an “Ident.” *Id.*

There are four stages involved in the completion of an individual name check: batch

1 processing, name searching, file review, and dissemination. Cannon Declaration ¶ 13. The first
2 stage in the process, batch processing, involves the transfer of the name check requests from
3 USCIS to the Name Check Programs on magnetic tapes. *Id.* The tapes are uploaded into an FBI
4 system and the names are electronically checked against the FBI's Universal Index (UNI).
5 Historically, during the batch processing stage, approximately 68 percent of name checks
6 submitted by USCIS are electronically checked and returned to USCIS as having "No Record"
7 within 48-72 hours. Cannon Declaration ¶ 13. A "No Record" indicates that the FBI's Universal
8 Index database contains no identifiable information regarding a particular individual. *Id.*

9 The second stage in the process is name searching. Cannon Declaration ¶ 14. For the name
10 check requests that are still pending after the initial electronic check, additional review is required.
11 *Id.* An FBI employee in the Name Check Program physically enters the applicant's name into the
12 computer database searching different fields and information. *Id.* A secondary manual name
13 search completed typically within 30-60 days historically identifies an additional 22 percent of the
14 USCIS requests as having "No Record," for a 90 percent overall "No Record" response rate. *Id.*
15 The results of this 22 percent also are returned to USCIS. *Id.*

16 The third and fourth stages in the process are file review and dissemination. Cannon
17 Declaration ¶ 15. The remaining 10 percent are identified as possibly being the subject of an FBI
18 record. *Id.* At that point, the FBI record must be retrieved and reviewed. *Id.* If the record was
19 electronically uploaded in the FBI's electronic record-keeping system, it can be reviewed quickly.
20 *Id.* If not, however, the relevant information must be retrieved from an existing paper record. *Id.*
21 Review of this information will determine whether the information is identified with the request.
22 *Id.* If the information is not identified with the request, the request is closed as a "No Record" and
23 USCIS is so notified. *Id.* Additional searches against the FBI's Universal Index, additional
24 manual name searches, and/or additional file review of a name check request, depending on the
25 length of time a name check request is pending in the processing queue, may occur periodically
26 during the name check process to ensure that stale information is updated. Cannon Declaration ¶
27 16.

28 Once a record is received, the FBI reviews the file for possible derogatory information.

1 Cannon Declaration ¶ 17. Less than 1 percent of USCIS's requests are identified with a file
2 containing possible derogatory information. *Id.* If appropriate, the FBI forwards a summary of the
3 derogatory information to USCIS. *Id.*

4 At each stage of the processing, the Name Check Program generally follows a first-in, first-
5 served protocol. Cannon Declaration ¶ 18. This protocol reflects that all applicants are equally
6 deserving and ensures that all applicants are treated fairly. *Id.* However, if an applicant's name
7 check requires a review of numerous FBI records and files, even though that person came in first,
8 the name check may require additional time until all responsive records are located and reviewed.
9 *Id.* The general exception to the first-in, first-served policy exists when USCIS directs that a name
10 check be handled on an "expedited" basis. Cannon Declaration ¶ 19. USCIS determines which
11 name checks are to be expedited based on criteria it determines. *Id.* Once designated as an
12 "expedite," that name check proceeds to the front of the queue along with other prioritized name
13 check requests, in front of the others waiting to be processed. *Id.*

14 Prior to September 11, 2001, the FBI processed approximately 2.5 million name checks per
15 year. Cannon Declaration ¶ 21. As a result of the FBI's post-9/11 counterterrorism efforts, the
16 number of name checks has grown. *Id.* For fiscal year 2006, the FBI processed in excess of 3.4
17 million name checks. *Id.*

18 In November of 2002, heightened national security concerns prompted a review of the former
19 INS's procedures for investigating the backgrounds of individuals seeking immigration benefits.
20 Cannon Declaration ¶ 23. It was determined that deeper, more detailed clearance procedures were
21 required to protect the people and the interests of the United States effectively. *Id.* One of the
22 procedures identified was the FBI's name check clearance. *Id.* In December of 2002, and January
23 of 2003, the former INS resubmitted 2.7 million name check requests for background
24 investigations of all individuals with then-pending applications for immigration benefits for which
25 the Immigration and Nationality Act required background investigations. Cannon Declaration ¶
26 24. Those 2.7 millions requests were in addition to the regular submissions by the former INS. *Id.*
27 Currently, the FBI has returned an initial response to all 2.7 million resubmitted requests. *Id.*
28 Moreover, although many of the FBI's initial responses to those resubmitted requests indicated

1 that the FBI had no information relating to the specific individual who was the subject of the
2 request, approximately 16 percent – or over 440,000 — resubmitted requests indicated that the FBI
3 may have information relating to the subject of the inquiry. *Id.*

4 The FBI's processing of those 440,000 resubmissions has delayed the processing of regular
5 submissions from USCIS. Cannon Declaration ¶ 25. A dedicated team with the FBI's National
6 Name Check Program has been assigned to handle only the re-submitted submissions from USCIS.
7 *Id.* To the extent the team members are working on only these applications, they are unavailable
8 to process the normal submissions which are completed on a first-in, first-out basis, unless
9 otherwise directed by USCIS. *Id.*

10 There are numerous factors that contribute to delays in the processing of name checks. Cannon
11 Declaration ¶ 26. One is the volume of incoming name checks – the total volume of name check
12 requests currently outpaces the FBI name check program's available resources to process the
13 incoming volume, in addition to being able to process those name checks currently pending. *Id.*
14 As it concerns submissions by USCIS, the fiscal year 2006, USCIS submitted approximately
15 1,633,000 name check requests, of which approximately 718,000 represented naturalization-
16 related name checks and approximately 658,000 represented adjustment of status-related name
17 checks. *Id.* As of the end of fiscal year 2006, the Name Check Program had over 364,600 pending
18 USCIS name check requests, of which over 157,300 represented naturalization-related name
19 checks and over 157,800 represented adjustment of status-related name checks. *Id.*

20 Second, the number of "hits" on a name when it is reviewed may further contribute to a delay
21 in processing a name check request. Cannon Declaration ¶ 27. A "hit" is a possible match with a
22 name in an FBI record. *Id.* The number of times the name appears in an FBI record correlates to
23 the number of records which require review. *Id.*

24 Third, the processing of common names also contributes to a delay in processing a name check
25 request. Cannon Declaration ¶ 28. The names associated with a name check request are searched
26 in a multitude of combinations, switching the order of first, last, and middle names, as well as
27 combinations with just the first and last, first and middle, and so on. *Id.* Without detailed
28 information in both the file and agency submissions, it is difficult to determine whether or not a

1 person with a common name is the same person mentioned in FBI records. *Id.* Common names
2 can often have more than 200 FBI records. *Id.*

3 Fourth, the accessibility of the FBI record needed for review also contributes to a delay in
4 processing a name check request. Cannon Declaration ¶ 29. If the date of the record is later than
5 October 1995, the record text may be available electronically; if the record predates October 1995,
6 the paper record has to be located, pulled, and reviewed. *Id.* A record could be at one of year 265
7 possible locations across the country. *Id.* Requests often involve coordinating the retrieval and
8 review of files from the various 56 different FBI field offices. *Id.* One person's name check may
9 involve locating and reviewing numerous files, all at different physical locations. *Id.* Since is a
10 paper-based process, it is a process subject to misplaced or misfiled files. *Id.* The process is time
11 consuming and labor intensive. *Id.*

12 Fifth, processing a request to expedite the processing of an FBI name check means that an
13 employee is not available to work on a normal name check request. Cannon Declaration ¶ 30.²

14 IV. ANALYSIS

15 A. DEFENDANT MUELLER SHOULD BE DISMISSED

16 Courts in this District have recognized that since March 1, 2003, the Department of Homeland
17 Security has been the agency responsible for implementing the immigration laws of the United
18 States.³ See 6 U.S.C. §§ 271(b)(5), 557; Alibeik v. Chertoff, No. C 07-1938 EDL, 2007 WL
19 4105527, at *3 (N.D. Cal. Nov. 16, 2007); Clayton v. Chertoff, et al., No. 07-cv-02781-CW, slip.
20 op., at 4-7 (N.D. Cal. Oct. 1, 2007); Konchitsky v. Chertoff, No. C-07-00294 RMW, 2007 WL
21 2070325, at *6-7 (N.D. Cal. July 13, 2007). Moreover, the FBI's name check process involves
22 discretionary actions. Yan v. Mueller, No. H-07-0313, 2007 WL 1521732, at *6 (S.D. Tex. May
23

24 ²The steps the FBI is taking to improve the efficiency of its name check processes are set
25 forth in the Cannon declaration at ¶¶ 31-38.

26 ³Defendants acknowledge a decision in this District to the contrary, but respectfully
27 submit that this minority decision is in error because that decision did not consider the
28 investigatory and discretionary nature of the name check. See Moretazpour v. Chertoff, No. 07-
4264 BZ, 2007 WL 428763 (N.D. Cal. Dec. 5, 2007).

24, 2007) (“The evidence shows that the delay is due, not only to the volume of requests that the FBI receives, but also to the FBI’s exercise of discretion in determining the timing for conducting the many name check requests that it receives and the manner in which to conduct those checks.”(emphasis added)). Finally, if any duty is owed by FBI, it is owed to USCIS, not Plaintiff. See Eldeeb v. Chertoff, No. 07-cv-236-T-17EAJ, 2007 WL 2209231, at *21 (M.D. Fla. July 30, 2007) (dismissing the FBI, stating that the duty owed by the FBI is to USCIS, not the plaintiff). Accordingly, Defendant Mueller should be dismissed from this action.

B. RELIEF IS UNAVAILABLE UNDER THE MANDAMUS STATUTE OR THE APA

Mandamus is reserved for those situations in which the agency has a ministerial, nondiscretionary duty that is so plainly prescribed as to be free from doubt. See *Kildare v. Saenz*, 325 F.3d 1078, 1084 (9th Cir. 2003). A ministerial act is “devoid of the exercise of judgment or discretion.” *Harmon Cove Condominium Ass’n, Inc. v. Marsh*, 815 F.2d 949, 951 (3d Cir. 1987). A duty is ministerial “where the officer can do only one thing.” *Work v. United States*, 267 U.S. 175, 177 (1925). Courts have consistently recognized that “the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.” *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980).

Similarly, a court has jurisdiction to act under section 706(1) of the APA (authorizing courts to “compel agency action . . . unreasonably delayed”) only when “an agency is compelled by law to act within a certain time period,” but the agency has failed to comply with that time period. See *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004). As an example, the Supreme Court in *Norton* stated that the Federal Communications Commission’s failure to establish regulations within 6 months of the date of the Telecommunications Act of 1996, as required by the Act, “would have supported a judicial decree under the APA requiring the prompt issuance of regulations.” See *id.* “The principal purpose of the APA limitations we have discussed – and of the traditional limitations upon mandamus from which they are derived – is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.” *Norton*, 542 U.S. at 66.

Here, the plaintiff cannot demonstrate the existence of a ministerial, non-discretionary duty or that the FBI or USCIS is compelled by law to act on her naturalization application within a specific period of time. In fact, Congress has expressly forbidden action on the plaintiff's naturalization application until USCIS receives the full results of her background check. Appropriations Act of 1998, Pub. L. 105-119, 111 Stat. 2440, 2448-49. Moreover, 8 C.F.R. § 335.2(b) provides that USCIS "will notify applicants for naturalization to appear before a Service officers for initial examination on the naturalization application only after the Service has received a definitive response from the Federal Bureau of Investigation that a full criminal background check of an applicant has been completed." (Emphasis added). Furthermore, USCIS has exercised its discretion in determining which name checks merit expedited service. Rangaswamy Declaration at Attachment B. Finally, requiring USCIS to request an expedite of the plaintiff's name check would violate the congressional directive against expending additional funds on adjudication. 1998 Appropriations Act, Pub. L. 105-119, 111 Stat. 2440, 2448-49; Rangaswamy Declaration ¶ 14 (explaining that USCIS must pay an additional fee for each expedite request). Accordingly, Plaintiff cannot establish the existence of a nondiscretionary duty to request an expedite of her name check or interview the plaintiff in the absence of a completed background check. Accordingly, the Court lacks subject matter jurisdiction.⁴

C. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiff cannot demonstrate that USCIS has failed to take a legally required action. Rather, Defendants are following a congressional mandate.

As set forth above, in 1997, Congress directed the legacy Immigration and Naturalization Service ("INS") to withhold adjudication of naturalization applications until all necessary background checks are complete. Appropriations Act of 1998, Pub. L. 105-119, 111 Stat. 2440, 2448-49. Accordingly, in 1998, the legacy INS amended 8 C.F.R. § 335.2 to require that USCIS await the completion of the background checks before conducting the initial interview of an

⁴The Declaratory Judgment Act does not provide an independent basis for jurisdiction; rather, it only expands the range of remedies available in federal courts. See Skelley Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950).

1 applicant:

2 (b) Completion of criminal background checks before examination. The
 3 Service will notify applicants for naturalization to appear before a Service
 4 officer for initial examination on the naturalization application only after the
 5 Service has received a definitive response from the Federal Bureau of
 Investigation that a full criminal background check of an applicant has been
 completed. A definitive response that a full criminal background check on an
 applicant has been completed includes:

6 (1) Confirmation from the Federal Bureau of Investigation that an
 7 applicant does not have an administrative or a criminal record;

8 (2) Confirmation from the Federal Bureau of Investigation that an
 9 applicant has an administrative or a criminal record; or

10 (3) Confirmation from the Federal Bureau of Investigation that two
 11 properly prepared fingerprint cards (Form FD-258) have been
 12 determined unclassifiable for the purpose of conducting a criminal
 13 background check and have been rejected.

14 8 C.F.R. § 335.2(b), as amended by 63 F.R. 12987, 12988 (Mar. 17, 1998); see Stepchuck v.
 15 Gonzales, No. CV 06-570, 2007 WL 184013, at *2, (W.D. Wash. Jan. 18, 2007) (finding the list in
 16 8 C.F.R. § 335.2(b) to be non-exclusive, and that an FBI name check may be considered part of the
 17 background check requirement).

18 Here, Plaintiff seeks relief in the form of an order compelling Defendants to fully adjudicate
 19 her application for naturalization. The “only agency action that can be compelled under the APA
 20 is action legally required.” Norton, 542 U.S. at 63. USCIS is prohibited from adjudicating
 21 plaintiff’s application, including scheduling an interview, until it has received the results of the
 22 name check. See 1998 Appropriations Act, Pub. L. 105-119, 111 Stat. 2440, 2448-49.

23 Accordingly, Plaintiff cannot establish that the properly named Defendants have unlawfully
 24 withheld or unreasonably delayed action on her application. 5 U.S.C. § 706(1).

25 Because Plaintiff is unable to demonstrate that USCIS has unlawfully withheld or unreasonably
 26 delayed action on her application, her Complaint should be dismissed for failure to state a claim
 27 upon which relief can be granted.

28 V. CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court to dismiss the Complaint.

1
2 DATED: March 14, 2008

Respectfully submitted,

3
4 JOSEPH P. RUSSONIELLO
United States Attorney

5
6 /s/
EDWARD A. OLSEN
7 Assistant United States Attorney
Attorneys for Defendants
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28